SUPREME JUDICIAL COURT

No. SJC-11530

EMORY G. SNELL,JR.,
Petitioner-Appellant,

vs.

OFFICE OF THE CHIEF MEDICAL EXAMINER,
Respondent-Appellee.

APPELLANT's REPLY BRIEF

28 January 2014

Emory G. Snell,Jr., pro se
965 Elm Str.
Concord, Ma. 01742-2119

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Statement of the Case

Appellant demanded of the Office of the Chief Medical Examiner, pursuant to Massachusetts Public Records Act; c.66, §10(a)(b); c.4, §7(26), and 950 CMR 32.et seqq., 27 separate paragraphs regarding OCME pathologist Dr. William Zane (Zane), **prior to** 1995. The Public Records demand was initiated due to numerous Media articles beginning in 1987, Eight (8)yrs. before Appellant's Barnstable County **criminal trial**.

On or about Oct. 30, 2012, the OCME summarily 'denied' Appellant's Public Records demand. Appellant timely appealed the OCME denial to Supervisor of Public Records (SPR), Shawn A. Williams (Williams). After undertaking a review of appellant's appeal, Mr. Williams on March 8, 2013, issued an **Administrative Order**.[1/]

It is beyond cavil that appellant under 950 CMR 32.09, as well as, c.66, §10(b), has both a regulatory and statutory right to enforce an **Administrative Order** issued by the SPR, and contrary to the single justices erroneous finding, Appellant neither is required to **again** seek the SPR to enforce that March 8, 2013 Administrative Order. What purpose would a Administrative Order serve, if a party had to repeatedly return to the SPR, when enforcing is both regulatorily, and statutorily available pursuant to 950 CMR 32.09; c.66, §10(b). Lack of enforcement of an Administrative Order which has the force of law, the records show arbitrarily disregarded by the Attorney General, to Appellant's per se prejudice, and his essential rights.

Appellee cannot argue against 950 CMR 32.09, or c.66,

1/ - AAG Marks, by way of motion, in lieu of Opposition Brief, constantly by fraud on the court, refers to the SPR's **Administrative Order**, as a "letter" in an obvious attempt to lessen this Court's power to adjudge that Administrative Orders, duly promulgated have the 'Force of Law.' See, DaLOMBA's CASE, 352 Mass. 598, 602 (1967)("Rules which have been promulgated pursuant to a legislative grant of power generally have the force of law. And whereas they may be properly revoked or amended, they may not be arbitrarily disregarded by individual members of the rule-making body to the prejudice of a party's essential rights.")(emphapsis added).

§10(b), has unambiguous language, speaks of the actions afforded appellant when an Administrative Order is disobeyed.

There is no question, as the SPR opines in his March 8, 2013, Administrative Order, if such obedience is not had in ten (10) days, 'Mr. Snell may seek enforcement by complaint in the [Supreme Judicial Court - c.66, §10(b)] superior court.' This Court only need follow that clear language of c.66, §10(b), which states:

> "... [I]f a custodian of a public record refuses or fails to comply with the request of any person for inspection or copy of a public record or with an **administrative order** under this section, the **supreme judicial** or superior court **shall have jurisdiction** to **order compliance.**"

id. (emphasis added for clarity).

In sum, Appellant's per se prejudice is overwhelming, as well as, unassailable as to the enforcement of the Administrative Order issued by the SPR on March 8, 2013 The fact that the reply by the AAG lawyer is fraudulently misleading this most Honorable Court, when the Administrative Order has the Force of Law, must show fraud on the court upon review.

Statement of the Facts

Appellant per 950 CMR 32.et seqq.,; c.4, §7(26), and c.66, §10(a)(b), sought a 27-paragraph Public Records Demand to the OCME. Whereupon denial of Appellant's public record demand, a timely appeal was made to the Supervisor of Public Records. The resulting appeal initiated a March 8, 2013 Administrative Order, which to date, has not been obeyed.

By way of motion in lieu of opposition brief, AAG Mark's knowingly and falsely opines that OCME general counsel Jacqueline Fathery did in fact obey the SPR March 8, 2013 Administrative Order. However, this statement is unassailably false. In fact, AAG Mark's opines that Fathery responded to the March 8, 2013 Administrative Order by providing Appellant nearly "300-pages" of documents. Moreover, AAG Mark's continues his fraud on the court by stating that Fathery provided more OCME documents to attorney Gary Pelletier sometime in July 2013.

However, none of those above statements must be weighed against Appellant, insomuch as, Appelalnt's **first** Public Records demand sought any and all records from the OCME concerning OCME pathologist William Zane **prior to 1995**.

Other than the 2-pg C.V. of Zane, none of those 296-pgs in anyway complied with Appellant's 27-paragraph public records demand. Indeed, in the July 2013 attempt to sidestep the SPR's March 8, 2013 Administrative Order, Fathery sent documents to Gary Pelletier, who is **not** in anyway party to Appellant's public records demand. Nowhere in the numerous records, papers or documents does attorney Pelletier state that he is acting in the Appellant's stead. Simply, had attorney Pelletier been involved, the SPR would not have addressed the non-compliance of his March 8, 2013 Administrative Order to "Mr. Snell," the Appellant.

In sum, Appellant individually sought specific OCME information **prior to 1995** on William Zane whose competence has been challenged since 1987, and continues to fail the test of a medically competent pathologist. This Court on the record before it, must summarily conclude that the SPR March 8, 2013 Administrative Order has the force of law, and that law [c.66, §10(b)] was unassailably disobeyed, and continues to the present.

Statement of the Issue

When c.66, §10(b) affords Appellant an avenue of enforcement to order compliance of a duly promulgated Administrative Order, was it judicial error that the single justice failed to apply that unambiguous language:

> "... [I]f a custodian of a public record refuses or fails to comply with the request of any person for inspection or copy of a public record or with an **administrative order** under this section, the **supreme judicial** or superior court **shall have jurisdiction to order compliance.**"

id. (emphasis added for clarity).

Therefore, the compelling issue is that the March 8, 2013 **Administrative Order** is abundantly clear, and speaks obviously above, that the single justice had no inherent power to abuse Appellant's right to enforce the Administrative Order that has the force of law. Appellant's claim to prejudice of his essential rights is unequivocal. This Court must decree that disobedience of the OCME to the SPR March 8, 2013 Administrative Order is unassailable and overwhelming.

ARGUMENT

I. **When 950 CMR 32.09 Provides For Enforcement Of Supervisor Of Public Records Administrative Orders, Is It Contrary To G.L. c.66, §10(b), That The Attorney General Is Arguing Against Appellant Violates Clear Statutory Intent.**

Appellant rightly argues that 950 CMR 32.09 (Enforcement of Orders), clearly through explicit mandatory predicate "SHALL" commands as follows:

> 32.09: "A custodian **shall** promptly take such steps as may be necessary to put an order of the Supervisor into effect. The Supervisor may notify the Attorney General or appropriate District Attorney of any failure by a custodian to comply with any order of the Supervisor."

id. (emphasis added). Therefore, this Court must be mindful of that explicit command, and find that the Attorney General is violating G.L. c.66, §10(b); c.4, §7(26), as well as, 950 CMR 32.09.

a. The Appellant Is Correct In Opining That His Right to Enforcement By The Supreme Judicial Court Is Proper, In Light Of The Attorney Generals Abandonment Of Its 950 CMR 32.09 Duty To Force The Office Of The Chief Medical Examiner To Obey A March 8, 2013 SPR Administrative Order.

Appellant has rightly demonstrated that the Supervisor of Public Records (SPR) issued a March 8, 2013 Administrative Order (AO) to the Office of the Chief Medical Examiner (OCME), clearly commanding the OCME to comply within Ten (10) days.

The Administrative Order not only was ignored by the OCME's general counsel, but no action was undertaken to either modify, clarify, or otherwise seek some remedy different from the explicit command of the AO.

Pursuant to G.L. c.66, §10(b), Appellant correctly states:

> §10(b): "A custodian of the public record **shall**, within ten days following receipt of a request for inspection or copy of a public record, comply with such request. Such requests may be delivered in hand to the custodian or mailed via first class mail.
>
> If the custodian refuses or fails to comply with such a request, the person making the request may petition the supervisor of records for a determination whether the record requested is public. Upon the determination by the supervisor of records that the record is public, he (SPR) **shall** order the custodian of the public record to comply with the person's (Appellant's) request. ..."

id. (emphasis added). Indeed, the record unassailably shows that Appellant did make the initial public records request in October 2012. The OCME denied appellant his public records request, and Appellant 'appealed' to the SPR. Whereupon a determination by the SPR that Appellant's request is proper within 950 CMR 32.et seq.; c.66, §10(a)(b), and c.4, §7(26), the SPR issued a March 8, 2013 AO.

Despite Appellant receiving the AO, and the subsequent failure of the OCME to comply within (10) days, Appellant did not receive enforcement by the Attorney General.

Accordingly, Appellant advances that under c.66, §10(b), whereas the Attorney General refused to enforce the SPR's March 8, 2013 AO. In fact, the SPR did not as per c.66, §10(b), contact the Attorney General to enforce the AO, and Appellant properly as per c.66, §10(b), proceeded with a judicial remedy:

> §10(b): "The administrative remedy provided by this section **shall** in no way limit the ... remedies provided ... nor **shall** the administrative remedy provided in this section ... limit the availability of judicial remedies otherwise available to **any person** requesting a public record.
>
> If a custodian of the public record refuses or fails to comply with the request of **any person** for inspection or copy of a public record or with an **administrative order** under this section, the **supreme judicial court ... shall** have jurisdiction to **order compliance.**"

id. (emphasis added). Appellant correctly advances that that §10(b)(the last part), confers power to the Attorney General, as does 950 CMR 32.09. Moreover, this Court has ultimate jurisdiction by Legislative intent, insomuch as, §10(b)'s explicit mandatory predicate '**shall**' unassailably confers power to this Court to 'order compliance.' Cf. PURITY SUPREME v. ATTORNEY GENERAL, 380 Mass. 762 (1980), (The Attorney General's office is an 'agency' as defined by c.30A, §1(2)); c.93A, §4. Whereas, both §10(b), and 950 CMR 32.09 contain that explicit mandatory predicate '**shall**,' such does not compel the Attorney General to

present this Court with the complete and utter failure to demonstrate that the OCME, a State Agency is not only refusing to obey either §10(b), and 950 CMR 32.09, but unlawfully taking a contrary to Law role.

Appellant is before this Court on the misapprehension of the single justice to grant Mandamus relief pursuant to §10(b), or 950 CMR 32.09. Appellant by way of further appellate review (FAR), argues that the single justices' denial of Mandamus, created actual legal harm, insomuch as, the Legislative intent of §10(b) is abundantly unambiguous.

This Court has long ago held that the Attorney General is the "chief law officer of the Commonwealth," COM. v. KOZLOWSKY, 238 Mass. 379, 389 (1921), and has control over the conduct of litigation involving the Commonwealth.

However, under KOZLOWSKY, this Court citing Old English Law, found that the power of the Attorney General who is afforded the powers to make policy determinations for representing State Agencies, could only do so, to uphold common law, and the practical administration of those Laws beneficial to the citizens of the Commonwealth. See, Art. 17 of the Articles of Amendment, Constitutional Convention of 1853, an attempt to give appointing power back to the the "supreme power," the people. Accord, SEC. OF ADMIN & Finance v. Atty Gen., 367 Mass. 154, 161 (1974).

It is beyond cavil that the Attorney General's duty to protect the interests of the citizens was dramatically changed, McQUESTEN v. ATTY GEN., 187 Mass. 185, 187 (1905), where the Attorney General appeared on-in the Supreme Judicial Court and acted as advisor only, on request, in other tribunals. This drastic change, required the Attorney General to represent the Commonwealth (the people) and department heads in all proceedings in which the Commonwealth was a party ... or in cases where official acts of said officers were called into question. See. c.12, §3, as amended through St. 1943, c.83, §1.

Appellant strongly contends that the crucial question in the instant case before this Court is; what role is the Attorney General assuming, as the record evinces that the OCME did not obey either §10(b), or 950 CMR 32.et seqq., obeying the March 8, 2013 SPR Administrative Order, is the issue.

Therefore, per c.12, §3, the Attorney General by taking a contrary, and seemingly adverse role to the public interests of the people of the commonwealth, can only be looked upon by this Court as an abdication of her official duty. See, ATTY GEN. v. TRUSTEES OF BOSTON ELEV. RY., 319 Mass. 642, 652 (1946); JACOBSON v. PARKS & REC. COMMN. of BOSTON, 345 Mass. 641, 644 (1963).

Thus, when the Attorney General was contacted by the OCME, her responsibility was first, to seek what ramifications of her representing the OCME affected the

public interests, or to evaluate if such represntations create a conflict of interest, requiring the Attorney General to decline legal involvement. The answer to the question is, that the Attorney General should not be defending the OCME's disobedience of §10(b), and certainly be enforcing 950 CMR 32.09, causing the complete and full disclosure of the OCME Public Records request sought by Appellate.

In sum, and best opined by Mr. Justice Fredrick Brown in LOVELL v. SUPT., NCCI, 26 Mass.App.Ct. 41 (1988), where he pointed out:

> "I would like to point out once again to attorneys, particularly those who represent the government, that their responsibilities involve counseling as well as, litigating. All to often such cases reach this court from the office of the attorney general. To 'Confess Error' does not have to be an abdication of professional responsibility; it is often the sensible course to take in clear cases in order not to present unnecessarily routine internal administrative disputes or housekeeping matters to a panel of the Appeals [Supreme Judicial] Court or to any other court. It is a complete waste of judicial time, as well as, an unnecessary dissipation of the limited resources of the Attorney General. I think it is a professional imperative for a government lawyer (as well as his duty as an officer of the court) to advise his client prior to litigation -- whether an agency, an administrator, or a policymaking official -- that a regulation, directive or other administrative scheme is legally foredoomed.
>
> On occasion, a skilled government attorney, if sufficiently knowledgeable, may wish to suggest that such action of the official is unwise or ill-advised.
>
> In sum, a good democratic government must be protected from within, as well as, watched from without."

id.

Conclusion

Wherefor, the Appellant correctly summerizes the unwise and ill-advised action of the Attorney General in clearly Confessing Error in that legal representation of the OCME, whose actions unassailably violate 950 CMR 32.09; c.66, §10(b), this most Honorable Court on §10(b)(the last part), must find that the OCME violated wantonly Appellants Public Records request, and did so without obeying the SPR's March 8, 2013 Administrative Order. So moved.

Respectfully submitted,
by, the Appellant,

Emory G. Snell,Jr., pro se
965 Elm Str.
Concord, Ma. 01742-2119

Certificate of Service

I, certify that on this day, a true copy of the attached was served on:

David Marks, AAG
Office of the Attorney General
One Ashburton Place
Boston, Ma. 02108

in accord w/103 CMR 481.10(2d part).